No. 512.

Brief for Appellant.

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UNITED STATES SUPREME COURT

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Filed April 26, 1900.

W. A. HICKS, Trustee in Bankruptcy of Albert Knost and Arnold Wilhelmy, Partners as Knost & Wilhelmy,

Appellant.

v.

MISS BERTHA KNOST,

Appellee.

IN BANKRUPTCY.

Brief for Appellant.

CHARLES M. PECK,

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BRIEF FOR APPELLANT.

This case comes into this court by certificate from the United States circuit court of appeals, of the sixth circuit, and presents the following question: Has a district court of the United States jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy appointed by it against a fraudulent grantee or transferee of the bankrupt resident in its district to recover the property belonging to the estate of the bankrupt, and by him fraudulently conveyed to defendant?

In behalf of the appellant, we maintain that the district court has jurisdiction to entertain such an action.

Whatever jurisdiction the district court has to entertain such an action, is given by the bankruptcy act of July 1, 1898, and we must look to its provisions to ascertain what jurisdiction, if any, is conferred upon the district court and also for the nature and extent of it

The provisions of the act creating the courts of bank-

ruptcy, and investing them with jurisdiction, are in substance as follows:

"Section 2. That the courts of bankruptcy, * * * viz., the district courts of the United States * * * are hereby made courts of bankruptcy, and are invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * (7) to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as herein otherwise provided."

This section expressly invests the district courts with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to determine controversies in relation to bankrupts' estates, except as otherwise provided in the act.

More briefly stated still, they have such jurisdiction at law and in equity in bankruptcy proceedings as is necessary to determine controversies in relation to the bankrupt's estates, except as otherwise provided.

The controversies referred to cannot be those in reference to claims by creditors against the bankrupt's estate, for class 2, of this section provides for the disposition of such controversies by allowing or rejecting such claims, but the controversies referred to must be those in reference to the claims of the estate against third parties, or controversies arising in the collection of the estate. By section 70, subdivision *a*, the trustee is vested with the title of all the property of the bankrupt as of the date of the adjudication, including the property transferred in fraud of creditors; and in subdivision *e* it is provided that the trustee may avoid fraudulent transfers and recover the property or its value; and by section 67, subdivision *a*, all property fraudulently conveyed, incumbered or transferred is made assets to the estate and passes to the trustee, and it is made his duty to recover it by legal proceedings or otherwise; and by subdivision *f* of this section, all levies, judgments, attachments and liens obtained by legal process within four months before the adjudication and while the bankrupt was insolvent, are void and the property passes to the trustee discharged from such liens; and by section 47, subdivision *a*, it is made the duty of the trustee to collect and reduce to money the property of the estate.

It follows from these provisions that these controversies in relation to the estate must be between the trustee and some party, not a creditor, adverse to the estate in interest, and also must, from their nature, be controversies at law and in equity.

From the foregoing it is manifest that the district courts are vested with such jurisdiction at law and in equity as will enable them, in a bankruptcy proceeding, to determine controversies in relation to the estate between the trustee and an adverse party, except as herein otherwise provided.

Some United States courts in defining the jurisdiction conferred by the present bankruptcy act, have attempted to apply the decisions under the old act of 1867 to the new, and have held, in substance, that section 2 only confers jurisdiction upon district courts to entertain bankruptcy proceedings pure and simple, as distinguished from actions at law and suits in equity; but in so doing, they have made no effort to construe the section from the language used as we have done above, but have assumed that the new act in its jurisdictional provisions is substantially the same as the old act, and that the decisions under the old are therefore fully applicable to the new.

Abraham v. Bernheimer, 93 Fed. Rep., 767.
In re Scott, 1 Fed. Rep.
Burnett v. Morris Mercantile Co., 91 Fed. Rep., 365.

The provisions of the act of 1867, in reference to the jurisdiction of the district courts, were in substance as follows:

The citations are from Bump on Bankruptcy, 8th ed.

Sec. 563. "The district courts are constituted courts of bankruptcy, and shall have * * * original jurisdiction in all matters and proceedings in bankruptcy."

Sec. 771. "The jurisdiction vested in courts of the United States, in the cases and proceedings hereinafter named, shall be exclusive of the courts of the several states." * * "6—Of all matters and proceedings in bankruptcy."

Sec. 4972. "The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

"First. To all cases and controversies arising between the bankrupt and creditors * * * under the bankruptcy.

"Second. To the collection of all the assets of the bankrupt.

"Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

"Fourth. To the adjustment of the various priorities and conflicting interests of all the parties.

"Fifth. To the marshaling and disposition of the dividend funds and assets, so as to secure the rights of all parties and due distribution of assets among all the creditors.

"Sixth. To all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution

and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy," etc.

Sec. 4973. "The district courts shall be always open for transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same power and jurisdiction * * * as when sitting in court."

Sec. 4979. "The several circuit courts shall have * * * concurrent jurisdiction with the district courts * * * of all suits at law and in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, and by such person against an assignee touching any property transferable to or vested in the assignee."

An inspection of section 563 alone shows that "original jurisdiction in all matters and proceedings in bankruptcy" may include all controversies as to the estate of every kind.

In re Christie, 3 Howard, 291 (313).

But the jurisdiction of "all matters and proceedings" in bankruptcy in section 711 is made exclusive of the state courts, and, since the state courts have always been held to have jurisdiction of controversies at law and in equity arising under the act, it follows that the jurisdiction under section 563, as limited in section 711, can not include controversies at law and in equity, but refers to bankruptcy proceedings only.

Bump. Bkcy., 220, 323 (8th ed.).

The jurisdiction conferred originally in section 563 is further explained and modified in section 4972, which provides that the jurisdiction conferred upon the district courts as courts of bankruptcy (being the limited jurisdiction of section 563), shall extend to some six classes of matters specially enumerated, and these various matters must be construed and limited to those matters embraced within the general jurisdiction conferred in section 563, and therefore can not include controversies at law and in equity.

Smith v. Mason, 14 Wal., 419.

Again, section 4973 provides that the district courts shall always be open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy, and that their power and jurisdiction as such courts shall be exercised as well in vacation as in term time, and since controversies at law and in equity could not be heard whenever the court might be open or in vacation, but only in term time, it is apparent that the jurisdiction is limited to bankruptcy proceedings pure

and simple, and does not include controversies at law or suits in equity.

By section 4979, jurisdiction is expressly conferrerd on the circuit courts and district courts of controversies at law, brought by the assignee or against him, in reference to adverse interests, and it follows that the prior jurisdiction given to the district courts in section 563 was not intended to be included in the jurisdiction given in this section, and thereby to include controversies at law and in equity.

Morgan v. Thornhill, 11 Wal., 65.

Smith v. Mason, 14 Wal., 419.

It would seem from the foregoing that the language in the various provisions in every way limits and confines the jurisdiction to the bankruptcy proceedings alone, and that this jurisdiction was to be exercised in a summary manner, and not in the formal way required in actions at law or suits in equity, and the courts as appears from above citations have held in accordance with these views.

In order to compare the provisions of the present act as to the jurisdiction of the district court with those of the old above set out, I shall state again in substance the provisions of section 2, it being the only section conferring jurisdiction upon the district courts.

Sec. 2, * * * "The district courts are hereby made courts of bankruptcy, and are hereby vested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms, as they are now or may hereafter be held, * * * to cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

The two acts are the same only in the parts constituting district courts courts of bankruptcy, and in all other respects are different in their language. The new invests the district courts with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to do some nineteen different classes of things, one of which is the collection of the estate and determination of controversies in relation thereto, while the old gives the court original jurisdiction in all matters and proceedings in bankruptcy, and by other provisionns limits it to strict proceedings in bankruptcy.

Jurisdiction is the power to enable and determine a matter, and its nature and extent must depend on the matter to be entertained and determined, and since the old act gives

the power to entertain and determine all matters and proceedings in bankruptcy as restricted by the other provisions, the jurisdiction conferred will be such as is necessary to administer such a proceeding, and is special and limited, and must be exercised in a summary manner, and not in accordance with the forms of procedure at law or in equity.

On the other hand, under the new act, the power to entertain and determine, in a bankruptcy proceeding, the nineteen classes of matters specifically named is directly given, and the jurisdiction must therefore be of the nature and extent necessary to entertain and determine each matter named, and since some of these are merely formal and administrative, and others are controversies at law or in equity (such as the determination of controversies in relation to the estate above shown), the jurisdiction conferred must be special and limited as to the former, and is to be exercised in a summary way, and as to the latter must be the broad general jurisdiction at law and in equity, necessary to determine controversies at law and in equity, and must be exercised in the formal manner required in such proceedings.

That such special and general jurisdiction may be exercised by the district courts is held in Smith v. Mason, 14 Wall. 419 (last paragraph of syllabus)

That this conclusion as to the nature of the jurisdiction is correct is further manifest from the fact that the language used is "such jurisdiction at law and in equity," etc., thereby expressly declaring the jurisdiction to be legal and equitable. Again, under the old act, the jurisdiction could be exercised as well in vacation as in term time, and could not therefore include the jurisdiction necessary to determine controversies at law and in equity; but under the new the jurisdiction is to be exercised in bankruptcy proceedings in vacation, in chambers, and during the terms of court, to do the many special matters, some of which may be entertained in vacation and in chambers and others can only be heard during term time.

The new act further differs from the old by making no attempt to confer jurisdiction generally in bankruptcy proceedings, and then explaining this general jurisdiction by stating specifically what it includes (sec. 4972); but on the contrary, attempts to confer jurisdiction specially to do each thing that can possibly arise in bankruptcy proceedings.

From the foregoing it appears that the two acts are different in all their jurisdictional provisions, and have no feature common to both, and the decisions as to the nature and extent of the jurisdiction under the old can be of no aid in ascertaining and fixing the jurisdiction under the new, and the deci-

sions of those courts assuming the two acts to be substantially the same, are entitled to little weight, and the new act must be construed from its own language without regard to the decisions under the old.

Having shown that the jurisdiction conferred on the district courts is such jurisdiction at law and in equity as will enable them, in a bankruptcy proceeding, to determine controversies at law and in equity relating to the estate "except as herein otherwise provided," I now wish to consider the force now and effect of this exception.

The exception must refer to some other parts of the act providing for the determination of controversies relating to bankrupts' estates, and on inspection we find that section 23 gives the circuit court jurisdiction of certain "controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees and adverse claimants;" that section 26 provides that the "trustee may submit to arbitration any controversies arising in the settlement of the estate;" and that section 27 provides that the trustee may compromise "any controversies arising in the administration of the estate."

We thus find that there are three ways or methods of determining controversies in relation to bankrupts' estates, to which the trustee is a party, provided in the act, other than by determining such controversies in the district courts as provided in section 2.

It is evident, therefore, that these three methods are the ones referred to in section 2, under "except as herein otherwise provided," and the provision with the exception would be in substance "such jurisdiction as will enable them to determine controversies except as they may be determined in the ways otherwise herein provided," viz: In sections 23, 26 and 27.

In opposition to this view, it is claimed, and some courts have so held, that the exception is intended to be a limitation on the power conferred, and not on the exercise of it, as above shown, and it is claimed that the exception is to be found in subdivision *b* of section 23, which is construed as a provision that suits by the trustee must be brought in the state courts, and thereby leaving the district courts with no jurisdiction to entertain suits between trustees and adverse parties.

In reply to this contention, we insist that in the nature of things an exception to a specific grant of power can only take away the power conferred to the extent that the exception clearly applies, but it is not intended to, and can not take away the power itself.

The Dollar Savings Bank v. The United States, 19 Wall., 227.

We can not suppose that congress having, in section 2, directly conferred power upon the district courts to determine controversies at law and in equity relating to bankrupts' estates, intended by the exception to take away that power and to thus leave the matter as if no provision had been made upon the subject; and if this contention be correct, then the district courts are without jurisdiction to entertain suits at law and in equity brought by the trustees, and their jurisdiction is limited to proceedings in bankruptcy strictly.

This position is not tenable, for it takes away from the district courts as courts of bankruptcy the power to entertain and determine those "controversies arising in bankruptcy proceedings" which are made the subject of appeal in section 24.

These controversies must be legal and equitable in order that they may be the subject of appeal, and they must be entertained and determined by courts of bankruptcy because the appeal is from courts of bankruptcy; and if section 24 is to have any force or effect, then the district courts as courts of bankruptcy must have jurisdiction of controversies at law and in equity, otherwise there can be no appeal from such courts.

Appeals in bankruptcy proceedings simply are provided for in section 25, but this section does not modify or affect section 24.

From the foregoing we must conclude that we can not construe subdivision *b* of section 23 as referring to the state courts and thus make it repugnant to section 2, class 7, and to section 24, and if we can give it some other reasonable construction consistent with these sections, it must be done.

Subdivision *b* is as follows:

"Suits by the trustee shall only be brought or prosecuted in the court where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

The bankrupt could only have brought suit in those courts having jurisdiction of the subject matter of the action, and which had the power to obtain jurisdiction of the person of the defendant according to existing laws, and the thing that especially points out the particular court where suit might be brought, is the power to obtain jurisdiction of the person of the defendant.

Many courts have jurisdiction of the subject matter, but only one court can obtain jurisdiction of the person, and this one is the court where the suit must be brought.

The section was not intended to define what courts have jurisdiction of the subject of the suits, but was only intended

to protect the defendant in his right to be sued in the court of his district, unless he by consent permitted some other court to entertain the suit against him.

He may, by consent, give a court jurisdiction of his person, but no one can by consent give to a court jurisdiction of the subject matter, and for this reason it is evident that this provision is not intended to affect or modify the jurisdiction of controversies conferred upon the district courts in previous sections.

A very similar provision is found in the federal statutes providing where suits against inhabitants of the United States must be brought. Sec. 739, which is in part as follows:

"No civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant."

No one for a moment would contend that this provision in any way is a limitation on the jurisdiction of the subject matter of actions conferred on the courts in other sections, and if the provision had been stated affirmatively instead of negatively it would be almost identical with the provision under consideration, and no one would maintain that it conferred jurisdiction of the subject matter upon the courts.

In support of the foregoing argument, I desire to offer the following authorities:

Carter, Trustee, v. Hobbs et al., 92 Fed. Rep., 594.
In re Chas. F. Sievers, 91 Fed. Rep., 366.
Davis v. Bohte et al., 9 Bk. News, 216; 92 Fed. Rep., 325.
Shutts v. First Nat'l Bank, 98 Fed. Rep., 705.

The argument and citations set out in this brief are the same as those set forth in our brief filed in the circuit court of appeals, except that we have added the case of Schultz v. Bank, recently decided by Judge Baker, of the United States district court of Indiana, and counsel for complainant in this case, filed a copy of our printed brief in support of his case, and the learned judge has largely followed it in his opinion.

In conclusion we respectfully submit that the United States district courts have jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy against a fraudulent grantee of the bankrupt to recover the property fraudulently transferred.

Respectfully submitted,

CHARLES M. PECK,

Counsel for Appellant.

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In support of the foregoing argument I desire to offer the following authorities:

Carter, Trustee, v. Hobbs et al., 92 Fed. Rep., 801.
In re Chas. F. Stivers, 91 Fed. Rep., 866.
Lyons v. Preble et al., 9 Fed. Cas., 216; 92 Fed. Rep., 325.
Shultz v. Rival Mfg. Comp., 96 Fed. Rep., 705.

The arguments and citations set out in this brief are the same as those set forth in our brief filed in the circuit court of appeals, except that we have added the case of Schultz v. Bank, recently decided by Judge Baker, of the United States district court of Indiana, and counsel for complainant in this case, filed a copy of our printed brief in support of his case, and the learned judge has largely followed it in his opinion.

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